

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH NAGPUR

Second Appeal No.631/2006

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Office Notes, Memoranda of

Coram appearances, Court's orders :  
or directions and Registrar's orders.

Court's or Judge's orders  
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**Coram : A.P.Lavande, J.**

**Dated : 20/3/2007**

Heard Mr. Joshi, learned counsel for the appellants.

This second appeal is directed against the judgment and decree dated 3.4.2006 passed by Additional District Judge, Akot in Regular Civil Appeal No.172/2005 dismissing the appeal filed by the appellants against the judgment and decree dated 8.3.2005 passed by the Civil Judge, Jr. Dn. Akot in Regular Civil Suit No. 149/2001.

The appellants are original defendants against whom the respondents-plaintiffs filed the suit for declaration and injunction claiming right of way by prescription as well as by of necessity. Upon appreciation of the evidence led by the parties, the trial Court decreed the suit holding that the plaintiffs had acquired right of way by prescription for

cultivation of the land bearing Gat No.91 as shown by letters A, B, C, D, E, F, G in the plaint map and restrained the defendants from obstructing the plaintiffs from using the said way. The trial Court, however, negated the claim of the plaintiffs insofar as the right of way by necessity is concerned. The appeal preferred by the defendants was dismissed. However, the lower Appellate Court held that the plaintiffs had acquired right of way by easement of necessity as well as by way of prescription.

Mr. Joshi, learned counsel appearing for the appellants submitted that the lower Appellate court could not have held that the plaintiffs had acquired right by way of necessity inasmuch as no cross-objection was filed by the plaintiffs insofar as adverse finding recorded by the trial Court as regards right of way by necessity is concerned. He submitted that the findings given by both the Courts below regarding acquisition of right of way by prescription by the plaintiffs, are perverse. He, therefore, submitted that the decree passed by lower Appellate Court deserves to be quashed and set aside.

Having perused the records and having considered the submissions made by learned counsel

for the appellants, I do not find any substance in the present appeal. No doubt, Mr. Joshi is right in submission that the lower Appellate Court could have given finding in favour of the plaintiffs and against the defendants insofar as acquisition of right of way by necessity, in appeal preferred by the defendants in the absence of any cross-objection by the plaintiffs. To that extent I find that the relief granted by the lower Appellate Court in favour of the plaintiffs cannot be sustained. However, insofar as grant of relief of declaration of right of way by prescription is concerned, I do not find any merit in the submission of Mr. Joshi. The finding recorded by the trial Court on this issue which has been confirmed by the lower appellate Court is a finding of fact arrived at by both the Courts below upon proper appreciation of the evidence led by the parties. I do not find any perversity in the finding recorded by the trial Court which has been confirmed by the lower Appellate court. This being the position, the appellants cannot succeed in the present appeal. If a second appeal is admitted on the substantial question of law, the answer to the same in favour of the appellants should ultimately result in allowing the appeal. This is not

possible in the present case since the finding regarding right of way by prescription is a finding which has been recorded upon proper appreciation of the evidence and does not warrant interference.

In view of the above, I do not find any merit in the second appeal. Hence, the appeal is summarily rejected.

C.A. No.7076/06

Since the appeal is dismissed, the application has become infructuous. Consequently, the application is dismissed as infructuous.

**JUDGE**

A.